

# PUBLICATION

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## Tread Carefully: EEOC Provides New Guidance on Using Criminal Records

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The U.S. Equal Employment Opportunity Commission (EEOC) recently issued enforcement [guidelines](#) on employer use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964. These updated guidelines supersede the EEOC's 1987 and 1990 policy statements, as well as the EEOC's discussion of the issue in its *Race & Color Discrimination Compliance Manual*. While the EEOC maintains that the guidelines do not change anything about its view of the law, a closer review reveals that the risk to employers conducting criminal records screening has meaningfully increased.

Under Title VII of the Civil Rights Act, an employment practice is unlawful if it discriminates against a job applicant because of race, color, religion, gender or national origin. An employer's criminal record policy can violate Title VII if it treats job applicants or employees with the same criminal records differently. An employer can also violate Title VII if it applies a uniform policy which results in a disproportionate impact on a protected class. Hiring decisions based on criminal records often have an adverse impact based on race and national origin. In those cases, an employer can still defend its policy, but only by showing that it is "job related and consistent with business necessity." Even then, a Title VII plaintiff can still prevail if he demonstrates that there is a less-discriminatory alternative that serves the employer's goals just as effectively.

The Commission maintains that employers should not solely rely on arrest records when making employment decisions because "arrests are not proof of criminal conduct" (although the Guidance allows employers to consider the underlying conduct if it makes the applicant unfit for the particular position). While the Commission acknowledges that criminal convictions are more insightful, it asserts that automatic blanket-exclusions for any applicant with a criminal record violate Title VII. Instead, it recommends that employers not ask about convictions on job applications, but rather cover that information in post-application discussions which focus on the existence of convictions that are job-related to the position in question.

The Commission also cautions employers to avoid the rationale that "we only hire the best of the best" to support excluding individuals convicted of crimes. The EEOC believes that such a claim does not meet the business necessity standard because it lacks factual support for its assertion that having a conviction is indicative of poor job performance, and it fails to show that all convictions create a risk in all of the employer's jobs at any time.

Notably, the EEOC identifies two circumstances under which it believes employers will consistently be able to establish a business necessity defense: (1) when the employer validates the criminal conduct screen in one of the three ways described in the EEOC's "Uniform Guidelines on Employee Selection Procedures"; and (2) when an employer develops a "targeted screen" policy that weighs the nature and gravity of the crime, the time that has passed since the offense, and the nature of the job, and then individually assesses whether the applicant/employee has been given an opportunity to show that the policy is not properly applied to him.

The EEOC has included "employer best practices" in the guidelines, which include:

- Eliminating blanket criminal conduct exclusion policies;
- Developing narrowly tailored written policies and practices to screen applicants and employees for criminal conduct;

- Training management on Title VII's prohibition against employment discrimination and how to implement new policies and procedures in compliance with Title VII;
- Identifying the essential job requirements and the circumstances under which all jobs are performed;
- Identifying specific criminal conduct that may show an applicant is unfit for the position;
- Identifying the appropriate duration of the exclusion based on available evidence (using the "individualized assessment" discussed above); and
- Recording the justification for the policies and procedures and keeping records of all consultations and research considered in creating policies and procedures consistent with Title VII.

While these guidelines do not have the force of law, they do provide guidance as to how the EEOC views employer requests for arrest and conviction information in assessing charges of discrimination. At the same time, the House voted 247-163 on May 10 to prohibit the EEOC from using allocated funds to administer, implement or enforce this Guidance. The Senate Appropriations Committee approved its EEOC funding bill in April, although the full Senate has not yet passed its appropriations bill. Once it does, the two bills would need to be reconciled.

If you have questions about how these new guidelines may affect your application and new hire process, please contact any of our nearly 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.